point -- that competitive forces will not generate a sufficient range of products optimized to meet the needs of persons with particular disabilities.

Expansive government regulation could have a devastating effect on manufacturers of customer premises equipment, who must already cope with narrow profit margins. Microsoft therefore suggests that the FCC proceed cautiously before imposing wide-ranging requirements on such manufacturers. *Without* regulation, manufacturers can afford to produce a wide variety of accessible products despite often limited demand. *With* broad regulation, companies may simply be driven out of manufacturing altogether, rather than adapt all of their products to government standards.

Rather than mandate an all-encompassing set of standards designed to meet the needs of all persons with every imaginable disability, the Commission therefore should adopt a flexible approach towards accessibility features in telecommunications services and equipment. Through such an approach, telecommunications companies can develop affordable products to address the needs of as many disabled people as possible.

2. The Commission Should Apply The ADA's "Readily Achievable" Standard Narrowly And Must Consider Costs

Section 255(a)(2) incorporates by reference the ADA definition of "readily achievable."[25] The Commission has sought comment on the application of this definition in the telecommunications context. NOI, ¶¶ 15-20. But the definition of "readily achievable" is difficult to apply to the telecommunications industry. For example, factors such as "the overall financial resources of the facility," "the number of persons

[25] 42 U.S.C. § 12182(b)(2)(A)(iv).

employed," and numerous others could lead a decision maker seeking to implement Section 255 into considering factors that are irrelevant to whether something is readily achievable *in the context of telecommunications*. Accordingly, we focus our comments on two points, the use of the marketplace to determine what is readily achievable and the cost of implementing improvements.

a. The Commission Should Rely On The Market To Develop Process-Oriented Standards Of What Is "Readily Achievable."

The ADA requires accessibility when it is "readily achievable,"[26] *i.e.*, "easily accomplishable and able to be carried out without much difficulty or expense." 1996 Act, §255(a)(2). That simple test, however, must be determined through the evaluation of four factors:

> 1) the nature and cost of the action needed under [the ADA];
> 2) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;[27]
> 3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> 4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.
>
> -- 42 U.S.C. § 12181(9).

[26] *Id.*

[27] The regulations implementing the ADA add a factor to this section: "legitimate safety requirements that are necessary for safe operation, including crime prevention measures." 28 C.F.R. § 36.104 (1996).

The statute and its implementing regulations, however, have not been applied without controversy. While the purpose of the "readily achievable" standard is indeed laudable, the standard has sometimes produced absurd results. Deciding whether particular accommodations are "readily achievable" is extremely difficult, and has created much confusion over the ADA's mandate. The Commission therefore should hesitate before importing the same standard into the field of telecommunications.

The following examples demonstrate the difficulty and costs of discerning what is "readily achievable":

- A Buffalo, New York restaurant owner closed his shop because he feared that he would be unable to bring his building into compliance with the ADA.[28] It was later discovered that his building was most likely already in compliance, and that no alterations would have been necessary.[29]
- Wheelchair-using country club members sued under the ADA, demanding that their club essentially rebuild its clubhouse, even though it was already wheelchair-accessible and provided viable alternatives to using the second floor. In a decision limiting the "readily achievable" standard, the court rejected this claim.[30] The court pointed out that "only 300 of the 10 million golfers in the United States use wheelchairs" and therefore the demanded renovations were not "financially sound."[31]
- In New York City, efforts to place six sidewalk public toilet kiosks throughout the city were blocked when advocates for the disabled protested that the kiosks would not accommodate wheelchairs. The dispute was only partially resolved when the city agreed to make one-half of the kiosks specially configured for wheelchair users, at twice the cost. Some advocates for the disabled continued to object, however, insisting that unless *all* the kiosks were wheelchair-accessible, none should be installed. The kiosks were never installed.[32]

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[28] *See McDonald's Townhouse Was in Compliance With ADA*, THE BUFFALO NEWS, June 12, 1996.

[29] *Id.*

[30] *Slaby v. Berkshire,* 928 F. Supp. 613 (D. Md. 1996).

[31] *Id.* at 615-16.

[32] Philip K. Howard, *The Death of Common Sense* 113-16 (1994). The public bathroom policy was not challenged under the ADA, but under a nearly identical New York law.

We set out these examples not to ridicule or demean the ADA. It has caused significant and beneficial changes in our society. However, the implementation of such a vague term as "readily achievable" has caused enormous difficulty. Instead of expanding access for disabled persons, the ADA has in many instances merely generated litigation and delay. As one commentator stated:

> Many presumed benefits [of the ADA] haven't yet blossomed, but the costs are all too real. Businesses as tiny as family-owned diners and corner dry cleaners are dodging regulators, in some cases paying tens of thousands in legal costs. Cash-strapped local governments are spending billions to comply with public-accommodations requirements. And the ADA's intended beneficiaries -- blind, deaf, or wheelchair-bound Americans now on public assistance -- are no more likely to be in the mainstream workplace now than in 1991.[33]

The ADA has greatly advanced the rights of persons with disabilities. Unfortunately, its ambiguous and sweeping language has stalled its implementation. Microsoft urges the Commission to ensure that Section 255 does not meet a similar fate.

The Commission has sought comment regarding what factors should be considered in determining what accommodations for accessibility are "readily achievable." NOI, ¶ 15. The Commission has also requested comments on how to apply the "readily achievable" standard in a way that will take advantage of market and technological developments without constraining innovation. NOI, ¶ 16. Microsoft

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[33] Brian Doherty, *Unreasonable Accommodation; the Americans With Disabilities Act,* REASON, Aug. 1995, at 18. For example, the ADA has been cited by anti-smoking groups alleging that restaurants and hotels have failed to make "reasonable accommodations" for persons with respiratory ailments by not providing smoke-free environments. Jon Jeter, *Maryland Coalition Fights Smoking War On A New Front -- 18 Restaurants Hit With Civil Rights Complaints On Behalf Of Those With Respiratory Ailments,* THE WASHINGTON POST, October 23, 1996.

urges the Commission to consider carefully the possible adverse effects of applying the ADA's view of "readily achievable." As illustrated above, the "readily achievable" standard could potentiallly create costly and perhaps ultimately counter-productive situations.

Instead, the Commission should rely primarily on market forces in determining what is needed and what is "readily achievable." Through the Accessibility Technology Clearinghouse ("ATC") we discuss at pages 32-33, the FCC would be able to determine more easily whether accessibility is "readily achievable" through existing technology and methods.

As discussed earlier, Microsoft has been working for several years to enhance the accessibility of its products in response to requests from individuals with disabilities and advocacy groups. Through market research and advice from such groups, Microsoft has become a leader in providing accessible solutions. This innovation has occurred in the absence of regulations and constraining standards that have no place in either of the fast-paced sectors of software or telecommunications. The market already provides an adequate incentive for providing accessible products.

Microsoft therefore recommends that the Commission adopt a presumption that the marketplace will determine whether the needs of disabled individuals are being met through innovations in the accessibility area. Absent a market failure, the Commission should not intervene to require accessibility based on advocacy rather than marketplace reality. If the market does not demonstrate a sufficiently broad need, then the

Commission should not force a telecommunications provider to bear the cost of developing a new product or service.[34]

In addition, the Commission has requested comments regarding whether it should promulgate specific performance standards or adopt a process-oriented approach in order to meet what is seen as "readily achievable." NOI, ¶ 19. Microsoft strongly urges the Commission to adopt a process-oriented approach rather than a specific technical or performance standard, as such an approach is much less likely to constrain innovation. Microsoft is aware that there are some issues that demand technical specifications, but these are exceptions to the rule and should be treated accordingly. Again, the marketplace will determine what types of products are needed by disabled individuals, and companies can adopt their own strategies and standards to meet those needs. If a process-oriented approach is adopted, the criteria should really be process-oriented rather than a subterfuge for command and control regulation seeking uniform results.[35]

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[34] Thus, if only a very limited group of disabled individuals would benefit from an innovation that would require significant design and engineering, and industry accordingly has not responded to that strong but limited demand, the Commission could quite properly take the view that the innovation was not readily achievable either on a direct cost basis or on more elaborate grounds.

[35] For example, there has been extensive criticism of the EPA's implementation of the Best Available Control Technology (BACT) concept, a process-oriented standard that the agency transformed into a rigid command-and-control regulatory scheme. *See, e.g.,* James C. Robinson, *The Impact of Environmental and Occupational Health Regulations On Productivity Growth in U.S. Manufacturing,* 12 Yale J. on Reg. 387, 394-95 (1995); Eric W. Orts, *Reflexive Environmental Law,* 89 Nw. U. L. Rev. 1227, 1235-41 (1995); Bruce A. Ackerman & Richard B. Steward, *Reforming Environmental Law*, 37 Stan. L. Rev. 1333, 1334-40 (1985).

b. The Commission Should Be Sensitive To The Cost Of Implementation And The Resources Of Affected Parties In Setting A Standard For What Is "Readily Achievable."

The "readily achievable" standard necessarily implicates the issue of the expense of providing access. Microsoft urges the Commission to be sensitive to cost issues regarding accessibility so as not to constrain competitive innovation. Again, we advocate a market approach to determine whether an accessibility accommodation is both necessary and "readily achievable."

A recent opinion from the United States Court of Appeals for the Seventh Circuit highlights the difficulties in balancing cost against the need for accessibility.[36] Because the case involved "employment" rather than "accommodation" under the ADA, the plaintiff did not have to meet the "readily achievable" standard, but rather the "undue burden" standard.[37] Nevertheless, the court rejected the plaintiff's claim:

> It is understood in that law [the negligence standard of "reasonable care"] that in deciding what care is reasonable the court considers the cost of increased care. . . . Similar reasoning could be used to flesh out the meaning of the word "reasonable" in the term "reasonable accommodations." It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit. Even if the employer is so large or wealthy . . . that it may not be able to plead "undue *hardship*," [an employer] would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee. If the nation's employers have potentially unlimited

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[36] *See Vande Zande v. State of Wisconsin Dept. of Administration,* 44 F.3d 538 (7th Cir. 1995).

[37] *See* 28 C.F.R. Part 36 (DOJ Commentary to Title III) (stating that "[t]he readily achievable standard is a "lower" standard than the "undue burden" standard in terms of the level of effort required, but the factors used in determining whether an action is readily achievable or would result in an undue burden are identical").

> financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national debt. We do not find an intention to bring about such a radical result in either the language of the Act or its history.
>
> -- *Vande Zande*, 44 F.3d at 542-43. (Posner, Chief Judge) (emphasis in original).

The court's concern and the examples cited above illustrate why the Commission should carefully interpret the phrase "readily achievable," so as not to impose significant and unnecessary costs on telecommunications equipment and service providers and eliminate new and innovative accessibility technologies.[38]

The Commission has sought examples of types and levels of costs that have been incurred to achieve accessibility of existing offerings (NOI, ¶ 17), and whether they may serve as a basis for anticipating costs. As discussed earlier at pages 2-5, Microsoft has invested a substantial amount of time and resources in the pursuit of expanding accessibility. The company has gone beyond the rhetoric of accessibility and has actually produced and implemented technology that makes it easier for people with disabilities to use Microsoft's products. Because of the broad scope of Microsoft's work in this area, however, the exact cost of these efforts is difficult to calculate. Simply put, Microsoft's commitment to accessibility is reflected in every facet of the company's operations. As such, it is nearly impossible to separate these substantial costs from Microsoft's overall operating expenditures. Nevertheless, based on a review of the time and manpower

[38] *See also* The Hearing Aid Compatibility Act of 1988, Pub. L. 100-394, 102 Stat. 976 (authorizing exemptions from requirements if compliance would increase the costs to such an extent that the equipment could not be marketed successfully).

consumed in its accessibility efforts, Microsoft feels comfortable in stating that the expense of producing and implementing accessibility technology has been enormous.

Costs are high. If regulations are adopted which make high costs the norm -- an indirect tax or unfunded mandate on industry -- then the purpose of Section 255 will be undermined. We strongly urge the Commission to be quite sensitive to the cost issue. **If *regulatory* costs are high, then *voluntary* efforts are unlikely to be undertaken, and meaningful and useful innovations will become increasingly rare.**

On a related matter, the Commission has sought comment regarding its assessment of a company's financial resources. NOI, ¶¶ 18-20. In the context of the ADA's application, this issue has been highly controversial.[39] It is extremely difficult to judge whether the resources of a parent company should be considered in judging whether accommodations to be made by a subsidiary are "readily achievable."

The ADA approach has been on a case-by-case basis, and Microsoft believes that this approach should be adopted here. If a subsidiary or other business unit is distinct from its parent, requiring the parent to absorb large accessibility costs to participate in that company may make other companies reluctant to enter or remain in various markets and could have short, medium, or long-term adverse effects on competition in numerous segments of the telecommunications field.

3. Definitions Of "Accessible To" And "Usable By."

Section 255 also incorporates the phrases "accessible to" and "usable by" from the ADA. NOI, ¶ 21. The Commission has sought comments regarding the application of

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[39] *See* 28 C.F.R. Part 36, App. B (DOJ Commentary to Title III).

these terms to Section 255. NOI, ¶¶ 21-23. Moreover, the Commission is also interested in whether commentors think equipment and services should be required to be universally accessible to all disabilities or whether providers of products and services can product differentiate. NOI, ¶ 23.

a. The Commission Should Apply The Requirement That Products And Services Be "Accessible To" And "Usable By" Persons With Disabilities Only To Entities With Direct Control Over Such Access.

Microsoft agrees with the Commission's interpretation of the application of the phrases "accessible to" and "usable by" in the telecommunications context. NOI, ¶ 21. Accessibility and usability are properly distinguishable and the requirement for physical accessibility should reach only those aspects of a service or piece of equipment over which companies have *direct control*. *Id.* Otherwise, what is "readily achievable" in terms of providing accessible products and services would be significantly diminished. Microsoft applauds the Commission's effort to limit the potential for conflicting regulatory requirements or overreaching.

b. The Commission Should Allow Product Differentiation In The Development Of Accessible Products And Services.

The Commission also seeks comment regarding whether each telecommunications product or service should be required to be accessible to all persons, or whether it would be acceptable to have some products or services available for certain disabilities, and others for other disabilities. NOI, ¶ 22. As stated previously at pages 14-19, Microsoft urges the Commission to recognize the differences between the entities subject to the ADA and those that are subject to Section 255. Although a structure or an employer can (theoretically) accommodate all disabilities at once, it is impossible for

providers of telecommunications services and products to create services and products that are, in themselves, accessible to all individuals with differing disabilities. If innovation and development should eventually permit such services or equipment, the marketplace will surely reward the developer. In the meantime, however, the Commission must be careful not to constrain innovation of services and products by requiring all products and services to meet specific accessibility requirements.

Product differentiation in a competitive marketplace should be encouraged. Some manufacturers of equipment may create products that are completely accessible in all models, while others may opt for making only some models of equipment accessible and usable. So long as the market for equipment is competitive -- *i.e.*, a sufficiently large number of models offered voluntarily are accessible -- government intervention is unwarranted. The same is true for services. If there is meaningful service competition and accessible services are available without government intervention, then the Government should not intervene. We believe that establishing a standard for such intervention should form the basis of a future Commission inquiry.[40]

Indeed, the Government is already a strong voice for accessibility. Under current federal procurement regulations, "in acquiring information technology, agencies shall identify their requirements, . . . including . . . accommodations for individuals with disabilities."[41] As a purchaser with enormous buying power, the Government has the

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[40] The Commission has also asked commentors to assess the current availability of accessible telecommunications products and services. NOI, ¶ 22. We leave that to others who are daily participants in the industry to provide.

[41] 48 CFR § 39.101 (1996).

capacity to encourage accessibility technology through its procurement practices, rather than by regulation.

The telecommunications industry is a dynamic group of businesses. It is imperative that any standards adopted not undermine that growth. Accessibility should reflect market forces, and strict regulations will only inhibit innovation.[42]

II. IMPLEMENTATION AND ENFORCEMENT

A. The Commission Should Promulgate Voluntary Guidelines Under Section 255 And Resolve Complaints On A Case-By-Case Basis.

The Commission has also requested comments on how it should carry out its duty to implement and enforce the provisions of Section 255. Specifically, the Commission has asked for comments on whether it should promulgate regulations, issue guidelines or resolve complaints on a case-by-case basis. NOI, ¶¶ 28-40.

Mandatory regulations will stifle innovation and drive up prices. Instead of such regulations, therefore, the Commission should periodically promulgate *voluntary* guidelines to assist telecommunications companies in developing accessible services and equipment. Similarly, Microsoft recommends that the Commission resolve complaints on a case-by-case basis. Finally, the Commission should place the burden of proof on the complainant and require alternative dispute resolution to resolve complaints.

Mandatory regulations are inconsistent with the thrust of the 1996 Act, and are likely to create regulatory lag. The more specific and elaborate the standards, the harder they will be to implement, causing delay rather than immediate compliance. That lag

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[42] The Commission has also inquired about compatibility (NOI, ¶ 24). Microsoft has no comment on this issue.

works to the disadvantage of the disabilities community. Moreover, as the Commission has acknowledged in the NOI, during its deliberations on the 1996 Act, Congress removed language from Section 255 that would have authorized the Commission to issue regulations. NOI, ¶ 29. Even assuming that the Commission has the power to promulgate regulations in this area in the first place, therefore, the final form of Section 255 strongly suggests that Congress did not intend for Section 255 to be encumbered by regulations.

As stated in the Conference Committee's Joint Explanatory Statement of the 1996 Act, the 1996 Act was intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private-sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[43] But extensive regulation, even in the pursuit of such a worthy goal as accessibility, runs precisely opposite to this statement. Rather than encouraging competition and development, regulations will stifle innovation and ultimately harm the persons they were meant to benefit.

The last decade has seen an explosion of telecommunications technology. This astonishing progress is due in large part to the freedom of telecommunications companies to pursue creative solutions for consumer and business needs. Unnecessary government intervention could undermine a principal goal of the information revolution and Section 255 itself -- increased consumer choice.

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[43] Telecommunications Act of 1996, Pub. L. 104-104 at 1 (opening paragraph), 110 Stat. 56 (1996).

The Commission therefore should consider the effect of regulation on future technology. Any regulations issued by the Commission will have to attempt to forecast the progression of accessibility technology. But regulation in anticipation of future developments will almost certainly undermine present innovation. The Commission acknowledged this fact more than twenty years ago, when it voiced its concern "that we do not, in our efforts to mold the communications structure of the future, unduly hamper the developing structure of today."[44] Voluntary, periodically updated guidelines will alert companies to the latest technological developments while providing them with the freedom to create innovative solutions to the difficulties encountered by disabled persons.

To encourage such innovation, Microsoft suggests the creation of a national Accessibility Technology Clearinghouse (ATC). This would be a database accessible to everyone and maintained by the Commission or a third-party organization. The ATC would have two benefits: 1) it would rapidly expand the access of disabled persons to telecommunications services and equipment; and 2) it would provide the Commission, the telecommunications industry and the disabilities community with a much better idea of what is "readily achievable" under Section 255.

The ATC would allow anyone to ascertain the latest developments in accessibility technology. Through the ATC, *all* telecommunications companies will be able to incorporate accessibility technology into their products and services, and consequently

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[44] *In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of a Moratorium on Non-Federal Standards,* 46 F.C.C. 175, 176 (1974).

persons with disabilities will see their access expand rapidly. Although companies would not be required to provide their proprietary information to the ATC, by voluntarily sharing non-proprietary information, they would effectively be marketing their accessibility technology to the very persons that need it most (and are willing to pay for it). The ATC would facilitate development of accessibility technology by connecting the technology producers with the technology buyers and allowing them to negotiate the terms of their cooperation.

The ATC will permit the Commission and persons with disabilities to monitor innovations in accessibility technology. Indeed, the clearinghouse could serve as a *per se* standard for complaints under Section 255 -- companies utilizing the available technology would be presumed to have complied with Section 255, while companies choosing other options could demonstrate that they achieved accessibility in some other fashion. This principle is particularly important in the context of Consumer Premises Equipment, where additional costs could have a devastating effect on already razor-thin profit margins.

Microsoft also recommends that the Commission place the burden of proof in any complaint proceeding squarely on the complainant. The "readily achievable" standard is not static when applied to telecommunications. Because of constant innovation and competition, the methods of obtaining access are constantly changing. With such an undefined goal in mind, the Commission should not force telecommunications companies "to prove a negative," *i.e.*, that they could not have "readily achieved" more access for persons with disabilities under some hypothetical set of facts. If the ATC or a similar

proposal is adopted, it could be used as a threshold in some types of cases at least to determine whether the complaint has any merit.

Finally, Microsoft notes that the telecommunications industry has already made great strides in improving accessibility for persons with disabilities through its own voluntary efforts. In keeping with the spirit of cooperation behind these actions, Microsoft recommends that the Commission resolve complaints under Section 255 through alternative dispute resolution techniques that permit quick, inexpensive and practical solutions for meritorious complaints.

B. Developing Equipment and CPE Guidelines In Conjunction With The Access Board

The Commission has requested comments on how it should cooperate with the Architectural and Transportation Barriers Compliance Board ("Access Board") in developing equipment and CPE guidelines. NOI, ¶ 35. Although this is an internal governmental matter best resolved between the Commission and the Access Board, we believe that since the Commission has the expertise in the telecommunications area and is the sole enforcement authority for Section 255 matters, it is the Commission that should, in its discretion, determine which of the Access Board's recommendations to adopt. However, both groups should proceed, to the maximum extent possible, in a spirit of cooperation so as to minimize any friction that might arise.

C. Complaints Under Section 255 Should Only Be Filed With The Commission Under Section 255.

The Commission has requested comment on its enforcement authority under Section 255. NOI, ¶¶ 36-40. Microsoft believes that Congress did *not* authorize a private

right of action under Section 255 by referring in its Conference Report for the 1996 Act[45] to 47 U.S.C. § 207,[46] which authorizes private rights of action against common carriers. Instead, Congress *explicitly* stated in Section 255 that no private right of action was created:

> Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.
>
> -- 1996 Act § 255(f).

Moreover, Section 255(f) was not included by accident or legislative inertia -- rather, it was *taken* from the House version of the 1996 version and *added* to the final bill by the Conference Committee on the 1996 Act.

Since the 1941 case of *Scripps-Howard Radio, Inc. v. FCC,*[47] the federal courts have uniformly held that, in the absence of an explicit private right of action under the telecommunications statutes, private litigants are barred from asserting such claims. This principle was reaffirmed as recently as this month by the United States Court of Appeals

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[45] The Conference Report states that "[t]he remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce compliance with the provisions of section 255." Telecommunications Act of 1996, Conference Report, Report 104-230, 104th Congress, 2d Session, Feb. 1, 1996, at 135.

[46] Section 207 states:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for [in Section 208], or may bring suit for the recovery of the damages for which such common carriers may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207.

[47] 316 U.S. 4 (1942).

for the Ninth Circuit in *Maydak v. Bonded Credit Co. Inc.*, 96 F.3d 1332 (9th Cir. 1996). In *Maydak,* the court rejected a suit brought under Section 207 by a plaintiff whose corporation incurred charges for calls to a 1-900 telephone number. Following the corporation's refusal to pay, its account was assigned to a collection agency. Eventually, the plaintiff sued the collection agency under Section 207, claiming that the 1-900 charges violated a tariff rate filed with the Commission by the corporation's long-distance carrier.

The Ninth Circuit dismissed this claim, however, holding that "private actions are generally limited to those explicitly authorized by the Act, except when implied in certain extremely narrow circumstances as an expression of federal common law." *Id.* at 1333. Since the collection agency was not a "common carrier," it could not be sued under Section 207 -- "courts have been unwilling thus far to extend federal subject-matter jurisdiction to any case in which a carrier is not a party." *Id.* at 1334.

Maydak and its predecessors demonstrate that Section 207 only authorizes private rights of action against common carriers. The Commission should act consistently with the clear intent of Congress and long-standing federal precedent by stating that Section 255 does not authorize private rights of action.

CONCLUSION

Microsoft hopes that these comments have been helpful to the Commission and that the actions of the Commission and the Access Board will take our proposals into account.

Respectfully submitted,

MICROSOFT CORPORATION

By David A. Bolnick/WHD
David A. Bolnick, Ph.D.
Accessibility and Disabilities Group
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Accessibility Program Manager for Microsoft Corporation

By Jack Krumholtz/WHD
Jack Krumholtz
Law and Corporate Affairs Department
Microsoft Corporation
Suite 600
5335 Wisconsin Avenue, N.W.
Washington, D.C. 20015

By Stanley M. Gorinson/WHD
Stanley M. Gorinson
William H. Davenport
Preston Gates Ellis & Rouvelas Meeds
Suite 500
1735 New York Avenue, N.W.
Washington, D.C. 20006

Attorneys for Microsoft Corporation

October 28, 1996

ATTACHMENTS TO COMMENTS OF MICROSOFT CORPORATION

TAB 1. Microsoft Windows Guidelines for Accessible Software Design (1995).

TAB 2. Designed for Microsoft Windows NT and Windows 95 -- Logo Handbook for Software Applications (July 1996).

CERTIFICATE OF SERVICE

I, Sharon Agranov, do hereby certify that copies of Microsoft Corporation's Comments in Response to the Commission's Notice of Inquiry have been served on the parties listed below via hand delivery (or as otherwise indicated) on this 28th day of October, 1996.

Sharon Agranov

Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

Commissioner Susan B. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, D.C. 20554

William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

ITS, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037

Julius Genachowski
Legal Counsel to the Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

John Nakahata
Senior Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Jane Mago
Senior Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

James L. Casserly
Senior Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Lauren J. Belvin
Senior Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Rudolfo Baca
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Elizabeth Lyle
Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, Room 5002
Washington, DC 20554

Rita McDonald
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, Room 5202
Washington, DC 20554

Stan Wiggins
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, Room 5202
Washington, DC 20554

David Seal
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, Room 5202
Washington, DC 20554